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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

In the Matter of the  
  
CITIZENSHIP OF DHL AIRWAYS, INC.

Docket OST-2002-13089

DEPT. OF TRANSPORTATION  
DOCKETS

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**MOTION OF DHL AIRWAYS FOR LEAVE AND CONSOLIDATED ANSWER**

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April 4, 2003

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**Docket OST-2002-13089**

**MOTION OF DHL AIRWAYS FOR LEAVE AND CONSOLIDATED ANSWER**

On March 26, 2003, United Parcel Service Co. ("UPS") filed a motion asking the Department to consider in this docket -- a docket pertaining to the citizenship of DHL Airways, Inc. ("Airways") -- a recently-announced transaction between DHL Worldwide Express ("DHLWE") and Airborne, Inc. ("Airborne").<sup>1</sup> On the same day, Federal Express Corporation ("Federal Express") filed an "emergency motion"<sup>2</sup> seeking the "rescission" of the Department's May 1, 2002, acknowledgement that Airways continues to be a U.S. citizen.<sup>3</sup>

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<sup>1</sup> Pursuant to Rule 6(c) of the Department's Rules of Practice, 14 C.F.R. § 302.6(c), and to the extent necessary, Airways requests leave to file this response to the latest unauthorized attack on its citizenship by UPS and Federal Express. Considerations of due process and fundamental fairness dictate that Airways be allowed to file this response.

<sup>2</sup> Although entitled an "emergency motion," Federal Express fails to identify the "emergency."

<sup>3</sup> In its pleading Federal Express refers erroneously to a "May 7, 2002 opinion" of the Assistant General Counsel for International Law. The actual date of the letter in question is May 1, 2002.

These latest unauthorized filings by UPS and Federal Express are wholly without merit. The Department should deny the unauthorized motions of UPS and Federal Express and promptly conclude this proceeding by issuing a written decision explaining the Department's rationale for its determination that Airways continues to be a U.S. citizen.<sup>4</sup>

Although filed in this docket pertaining to Airways' citizenship, the motions of UPS and Federal Express concern the recently-announced transaction between DHLWE and Airborne. The motions discuss at length the details of that transaction, the future relationship between those two companies, and certain statements made by Airborne's Chief Executive Officer. UPS and Federal Express fail to demonstrate how a transaction to which Airways is not a party has any bearing on the question of whether Airways is a U.S. citizen -- the sole issue before the Department in this docket. Indeed, the Airborne transaction obviously is irrelevant to the issue of Airways' citizenship, an issue that has been thoroughly reviewed by the Department in this and related dockets and has been the subject of numerous (generally unauthorized) pleadings by UPS and Federal Express.

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<sup>4</sup> Notably, in a letter from the Secretary of Transportation to Chairman Ernest F. Hollings of the Senate Committee on Commerce, Science and Transportation, dated September 25, 2002 ("Mineta letter"), Secretary Mineta described in detail the procedures used by the Department to conduct the Airways investigation, the public policy basis for the procedures used, evidence that "the case of DHL Airways shows that the current process is working" and indications that final agency action on the pending complaints of UPS and Federal Express would be forthcoming. The Secretary also indicated that "[t]he statute governing the Department's aviation economic responsibilities gives parties the right to seek judicial review of the final Department decision on the UPS and FedEx requests" (Mineta letter at 2-3). It would be ironic indeed if an unrelated investigation into the DHLWE/Airborne transaction were allowed to delay final disposition of this case, sought so long by the complainants.

Simply stated, UPS and Federal Express are using this proceeding as a forum for launching a preemptive regulatory assault on the DHLWE/Airborne transaction -- a transaction that does not involve Airways. The UPS and Federal Express motions are exclusively devoted to issues regarding the DHLWE/Airborne transaction and DHLWE's parent company Deutsche Post. These issues, which have nothing to do with Airways, do not require a substantive response from Airways, are entirely irrelevant to any issue in this proceeding, and should not be considered here.

UPS and Federal Express also have adopted a strategy of seeking to prolong this proceeding as long as possible, keeping the question of Airways' citizenship "in play." They also appear to be pursuing a strategy of harassing Airways and the Department with a relentless succession of frivolous, unauthorized pleadings addressing matters that are completely extraneous to the only issue in this docket, Airways' citizenship. Indeed, UPS expressly asks the Department to investigate the DHLWE/Airborne transaction in this docket. Such a course of action would serve only to add irrelevant issues to this proceeding and delay resolution of the Airways investigation, a particularly ironic result since both complainants have sought a final order from the Department setting forth the base for the Department's conclusion that Airways remains a U.S. citizen.

Federal Express' request is even more irrelevant than the UPS motion. Federal Express requests that the Department "rescind" its May 1, 2002, "decision" concluding that Airways is a U.S. citizen. Federal Express goes so far as to suggest that the Department take such extraordinary action without a factual or legal basis and without even an opportunity for Airways to be heard, solely

because two other companies (DHLWE and Airborne) have announced an entirely unrelated transaction. Federal Express' position is preposterous.

On May 1, 2002, the Department formally notified Airways that Airways continues to be a U.S. citizen.<sup>5</sup> In the Mineta letter, *supra*, the Secretary confirmed that Airways is a U.S. citizen, although he noted that complaints against Airways by UPS and Federal Express were still pending before the Department. Nothing has changed since then to affect Airways' citizenship, certainly not the DHLWE/Airborne agreement to which Airways is not even a party. If the DHLWE/Airborne transaction raises any questions about the citizenship of the spun-off carrier, ABX Air, those questions should be considered separately, not in the context of third-party complaints challenging the citizenship of Airways. Despite Federal Express' contrary position, Airways continues to be a U.S. citizen and the Department's decision so concluding remains sound.<sup>6</sup> It should not (and cannot) be

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<sup>5</sup> Federal Express restates yet again its unfounded argument that the May 1, 2002, letter was not a final decision adopted by the Department. Federal Express fundamentally -- and perhaps intentionally -- misunderstands the Department's informal continuing fitness review process. As Secretary Mineta has explained, the May 1, 2002 letter constituted the Department's notification to Airways that it had concluded its informal review and determined that Airways continues to be a U.S. citizen. The Department, however, was not required by statute, regulation, policy, or precedent to issue any formal, public order, or other written notice, of that determination.

<sup>6</sup> With its most recent motion, UPS seems to be retrenching from its position that Airways is not a U.S. citizen. Instead, in an extraordinary statement, UPS claims that, even if Airways and ABX Air each may continue to be U.S. citizens in their own right, a consolidated review could lead to evidence undermining that fact. *UPS Motion* at 5 ("even if these transactions may be acceptable taken separately, reviewed together, they might raise significant issues relevant to the public interest that the DOT is required to protect."). This statement lays bare UPS's lack of faith in its own allegations; it also exposes UPS's vain hope that it nonetheless can exploit the Department's procedures to interfere with a competitor's legitimate commercial activities. UPS's anticompetitive agenda, however, is bereft of the requisite supporting evidence and based

rescinded at the behest of a competitor based solely upon the announcement by other parties of an unrelated transaction, and without any factual or legal basis.

Finally, the present motions reflect UPS's and Federal Express' continued practice of filing unauthorized documents in blatant disregard of the Department's Rules of Practice.<sup>7</sup> UPS and Federal Express cannot simply create procedural rules as they see fit to serve their interests. The Department's rules cannot be cast aside capriciously and carelessly. For over two years, UPS and Federal Express have filed pleading after pleading, motion after motion, in numerous related and unrelated dockets attacking Airways' citizenship. The Department's forbearance of such tactics has served only to embolden them. It is time for the Department to conclude this matter and dismiss these baseless complaints.

## **CONCLUSION**

The motions of UPS and Federal Express are irrelevant, frivolous, and constitute yet a further abuse of the Department's procedures. The Department should deny the motions and promptly conclude this proceeding by issuing a


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on irresponsible, unfounded speculation. In short, UPS, apparently recognizing the lack of substance behind its allegations about Airways' citizenship, is seeking nothing more than to confuse and obstruct this proceeding.

<sup>7</sup> UPS argues that its motion is authorized under Rule 302.11 but indicates that the Department may deem it an unauthorized document. *Motion of UPS* at 1 n.1. Federal Express' motion conspicuously fails to cite any procedural rule supporting its self-styled "emergency motion."

written decision explaining the reasons for its determination that Airways continues to be a U.S. citizen.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen H. Lachter", is written over a horizontal line.

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April 4, 2003

## CERTIFICATE OF SERVICE

I hereby certify that I have served by 1st class mail, copies of the foregoing Motion of DHL Airways for Leave and Consolidated Answer, this 4th day of April, 2003 to all persons named on the Service List.



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